

WILLARD PEASE OIL AND GAS CO.

IBLA 84-847

Decided October 29, 1985

Appeal from a decision of the Utah State Office, Bureau of Land Management, affirming issuance of notices of incidents of noncompliance and adjusting assessment of liquidated damages. U-145834.

Affirmed as modified in part, vacated in part.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Regulations: Generally

BLM may properly issue a notice of incidents of noncompliance requiring an oil and gas lessee to remove oil contaminated soil from the well site pursuant to 43 CFR 3162.5-1, and assess liquidated damages for failure to timely comply with that notice by removing all contaminated soil. However, the assessment for noncompliance will be reduced to a one-time, rather than a successive, charge to reflect a change in the applicable regulation regarding assessments, 43 CFR 3163.3.

APPEARANCES: William M. Kane, Esq., Grand Junction, Colorado, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Willard Pease Oil and Gas Company has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated July 20, 1984, affirming issuance of notices of incidents of noncompliance (INC's) and adjusting the assessment of liquidated damages for such noncompliance, with respect to certain wells on noncompetitive oil and gas lease U-145834.

On April 17, 1984, the San Juan, Utah, Resource Area, BLM, issued INC's to appellant, the operator of the Cowboy Nos. 1 and 7 oil and gas wells situated in secs. 14 and 23, T. 39 S., R. 22 E., Salt Lake Meridian, Utah. With respect to the Cowboy No. 1 well, BLM required appellant to "[r]emove and dispose of oily soil around tanks per 43 CFR 3162.5-1." With respect to the Cowboy No. 7 well, BLM required appellant to "[p]aint or clearly label tank numbers" in accordance with 43 CFR 3162.7-4(b)(6) and to "[r]emove and dispose of oily soil [from well head to edge of well pad (approximately 30 feet)] per 43 CFR 3162.5-1." In all cases, BLM stated the incident of noncompliance

"must be corrected within (30) days of receipt of this notice." The record indicates appellant received the INC's on April 24, 1984. By letter dated April 23, 1984, BLM notified appellant that "[f]ailure to correct these incidents of noncompliance within the time allowed will result in the assessment of damages in accordance with 43 CFR 3163.3 in the amount of \$250 per day per violation."

On May 30, 1984, BLM reinspected the Cowboy Nos. 1 and 7 wells. In a compliance check report, dated June 6, 1984, with respect to the Cowboy No. 1 well, M. O. Wade, the BLM inspector, stated: "Oily soil covered but not removed." In a compliance check report, dated June 6, 1984, with respect to the Cowboy No. 7 well, Wade stated: "Oily soil covered but not removed and no unique numbers on tank." Both these reports referred to the May 30 inspection. The continuing noncompliance in both cases was confirmed in follow-up compliance check reports, dated June 6, 1984, based on a June 4, 1984, reinspection. The record also indicates that in a June 5, 1984, telephone conversation, appellant was notified that it was being assessed \$250 per day for each violation.

By letter dated June 6, 1984, BLM informed appellant that "due to your failure to fully correct the above cited incidents of noncompliance [including those involved herein] within the time allowed, you are hereby assessed damages of \$250 per incident \* \* \* in accordance with 43 CFR 3163.3(b)." <sup>1/</sup> In an inspection of the sites on June 6, 1984, set forth in compliance check reports dated June 6, 1984, Wade stated that the "last of the oily soil was being buried" with respect to Cowboy No. 1 well and that "work has been started to remove oily soil" with respect to the Cowboy No. 7 well. The removal of the oil-saturated soil with respect to the Cowboy No. 7 well was confirmed in a June 8, 1984 compliance check report, following a June 7, 1984 inspection. In a compliance check report dated June 13, 1984, after an inspection on that date, Wade stated that the "[n]umbers [were] on tank on 6/12/84" with respect to the Cowboy No. 7 well.

By letter dated June 22, 1984, BLM informed appellant that it was being assessed \$250 per day for each of the incidents of noncompliance from the "original deadline" to the time of compliance, i.e., 12 days for failure to remove oily soil with respect to the Cowboy No. 1 well (\$3,000) and 17 days for failure to paint numbers on the tank (\$4,250) and 12 days for failure to remove oily soil (\$3,000) with respect to the Cowboy No. 7 well.

Appellant thereafter filed a request for a technical and procedural review on July 6, 1984, pursuant to 43 CFR 3165.3. In its July 20, 1984

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<sup>1/</sup> BLM incorrectly cited 43 CFR 3163.3(b), as authority for the assessment. That regulation provides for assessment of the actual cost of performance, plus 25 percent for "failure to perform any operation ordered in writing by the authorized officer, if said operation is thereafter performed by or through the authorized officer." Appellant ultimately cleaned up the oily soil at its own expense. The proper regulation to cite was 43 CFR 3163.3(a) (failure to comply with a written order). However, it appears that BLM actually relied on sec. 3163.3(a) in assessing the \$250 in liquidated damages.

decision, BLM affirmed issuance of the INC's involved herein because the evidence "substantiates the noncompliance and the lack of timely correction [despite] [s]pecific instructions clearly indicating the corrective actions needed with proper references to the regulations." However, BLM concluded the assessments were "excessive" in part and eliminated certain assessments not involved herein and reduced the assessment to \$3,000 with respect to the Cowboy No. 7 well because the tank had been numbered by June 7, 1984.

In its statement of reasons for appeal, appellant first contends that the oil tank for the Cowboy No. 7 well "was properly numbered within thirty days after issuance of the [INC]." The record indicates that BLM agrees with appellant's contention. By letter dated August 20, 1984, BLM notified appellant that the \$3,000 assessment was "in error as the oil tank did, indeed, have a unique number when inspected on May 30, 1984." Therefore, we need not further address this issue. The July 1984 BLM decision is hereby vacated with respect to this assessment.

Regarding the failure to remove oil-saturated soil until June 6, 1984, with respect to the Cowboy Nos. 1 and 7 wells, appellant contends it "brought both wells into compliance on or before May 24, 1984." Appellant states that, between April 26 and May 16, 1984, it spent \$1,690 in a "good faith effort" to bring the wells into compliance, having a contractor remove approximately the "top foot of soil" and replace it with fresh soil. Appellant notes that this is the "accepted practice" of dealing with oily soil in the area. Moreover, appellant argues it is "inequitable" for BLM to retroactively levy ongoing assessments after May 24, 1984, the date for compliance, without notice to appellant that its attempt at compliance was inadequate. Appellant states it was not aware that BLM regarded the noncompliance as "continuing" until a June 5, 1984, telephone conversation and that the "maximum fine" should be \$250 per day per well "for the two-day period commencing June 5, 1984." In the alternative, appellant contends BLM was not entitled to levy the assessments because the INC's were based on a vague regulation, 43 CFR 3162.5-1, which is "void as in violation of [appellant's] procedural due process rights," and that, in any case, BLM should exercise its discretion pursuant to 43 CFR 3163.1, to reduce the "fine" to reflect "actual loss or damage" because of the de minimis impact on the environment. Appellant also requests a hearing before an Administrative Law Judge.

In response to appellant's statement of reasons, BLM contends the follow-up inspections by the BLM inspector clearly found the oily soil had not been removed, but only covered. BLM notes this had been the "past practice in the 'oil field'" and asserts this is why the INC was written to specifically require removal of the contaminated soil. BLM argues that its May 30, 1984, inspection was not untimely and that it is "unreasonable to expect our inspection staff to inspect every lease on the exact date of final compliance." BLM concludes the INC was "specific" and appellant simply failed to comply within the 30-day time period.

[1] The Departmental regulations applicable to the management of onshore oil and gas operations require lessees to "conduct operations in a manner which protects the mineral resources, other natural resources and environmental quality" and to "comply with the pertinent orders of the authorized officer." 43 CFR 3162.5-1(a); see also 43 CFR 3162.1. In addition,

lessees are required to report "[a]ll spills or leakages of oil" and to "exercise due diligence in taking necessary measures, subject to approval by the authorized officer, to control and remove pollutants." 43 CFR 3162.5-1(c). It is, thus, evident that BLM has the authority under the regulations to order an oil and gas lessee to remove oil saturated soil from leased land. Moreover, we can find no ambiguity in the INC's involved herein, in this respect. Appellant was under a clear directive to remove the identified oily soil by May 24, 1984.

Appellant, however, argues it made a good faith effort to comply with the INC's. Appellant submitted invoices dated April 30 and May 31, 1984, from Lee Long Contracting Company which indicate work done with respect to the Cowboy Nos. 1 and 7 wells. The April 30 invoice refers to work done on April 26 to "clean out" oily dirt and to "refill with clean dirt." This evidence suggests a good faith effort to remove oily soil with respect to the wells.

The photographic evidence in the record, however, contradicts appellant's claim. There are photographs of the area around the oil tank with respect to the Cowboy No. 1 well and near the well head with respect to the Cowboy No. 7 well, taken on April 17, May 30, June 6 and 7, 1984. The April 17 photographs indicate a definite discoloration of the soil from the pipe running into the oil tank (Cowboy No. 1) and the well head (Cowboy No. 7). In May 30 photographs of these same areas, the discoloration is less pronounced but still evident, with the exception of the area immediately around the pipe running into the oil tank (Cowboy No. 1), which is a blackened area (the same as it appears in the April 17, 1984 photograph). Notations on the May 30 photograph state the oil is "wicking" back up through the fresh soil deposited on top of the spilled oil. By contrast, the June 6 and 7 photographs of the areas show no discoloration.

The photographic evidence suggests either that appellant's contractor simply covered the spilled oil or that it failed to remove all of the spilled oil, because oil discolorations still appear in the photographs taken May 30, 1984. With respect to the blackened area around the oil tank, no effort appears to have been made to remove the oily soil by May 30. We must therefore hold that appellant failed to comply with the directive in the INC's to remove and dispose of oily soil within the specified time. The evidence taken together establishes appellant did not remove all of the oily soil, with respect to either of the wells, by May 24, 1984.

Hence, we reach the question of what assessment should be levied for a violation of the INC's. Appellant argues the maximum "fine" should be for the 2 days between notice of the continuing noncompliance (June 5) and the date of compliance (June 6). Appellant contends that, given its good faith efforts, it cannot be assessed for the period of time it was not on notice that its efforts had not succeeded in complying with the INC's, i.e., between May 24 and June 5.

In view of a change in the applicable regulations, described below, we need not address the question of whether BLM could properly assess appellant for each day of noncompliance after May 24, 1984. The applicable regulation,

43 CFR 3163.3, provides for liquidated damages 2/ in certain instances of noncompliance including "failure to comply with a written order \* \* \* if compliance is not obtained within the time specified." 43 CFR 3163.3(a). The amount of liquidated damages in the latter case is \$250. In addition, however, the regulation formerly provided that the "specified loss or damage shall be applicable to each successive day of the noncompliance." 43 CFR 3163.3 (1983). The foregoing regulation, however, was amended effective October 22, 1984, deleting the provision for continuing assessment of liquidated damages for each day of noncompliance. See 49 FR 37361, 37365 (Sept. 21, 1984). 3/ Thus, at present, BLM is only entitled to assess a one-time liquidated damages charge of \$250 for each instance of noncompliance arising from failure to comply with a written order of an authorized officer. See 49 FR 37361 (Sept. 21, 1984). In the absence of any intervening rights which would be adversely affected or countervailing public policy considerations, we will apply the amended regulation to benefit appellant in the present case. James E. Strong, 45 IBLA 386 (1980). Thus, the decision of BLM will be affirmed to the extent of an assessment of a total of \$500 for

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2/ 43 CFR 3163.3 states in part:

"Certain instances of noncompliance result in loss or damage to the lessor, the amount of which is difficult or impracticable to ascertain. Except where actual losses or damages can be ascertained in an amount larger than that set forth below, the following amounts shall be deemed to cover loss or damage to the lessor from specific instances of noncompliance."

3/ The preamble to this regulatory revision gave the following cogent explanation for this change:

"Section 3163.3 Assessments for noncompliance:

Two comments suggested that certain of the assessments provided for in this section of the existing regulations are de facto penalties and should either be removed by the final rulemaking or applied under the procedures prescribed by section 109 of the Federal Oil and Gas Royalty Management Act and § 3163.3 of the existing regulations. The final rulemaking does not adopt either of these suggested changes because such assessments do not constitute penalties. While these assessments may appear to be penalties, they are merely compensation to the United States for damages to resources or existing improvements and the added administrative cost to the United States caused by reason of a lessee's failure to comply with the regulations in this part and the resultant need for regulatory action to obtain a correction of the deficiency. Since the penalty provisions in both the proposed and final rulemakings are imposed for the continued disregard of orders to correct, there is no longer a need to continue assessments during such noncompliance and, therefore, the final rulemaking modifies § 3163.3 to indicate that any assessment for a violation will be a one-time charge."

49 FR 37361 (Sept. 21, 1984).

We note that the revised regulations under 43 CFR Part 3160 published Sept. 21, 1984, were suspended, in part, by notice published in the Federal Register on Mar. 22, 1985. 50 FR 11517-18. See BLM Instruction Memorandum Nos. 84-594, Change 4, and 85-384, dated Apr. 16, 1985. However, the suspension did not affect the provisions of 43 CFR 3163.3(a) or the elimination of the successive daily assessments for noncompliance.

appellant's failure to comply with the two INC's involved herein as of May 24, 1984. 4/

Appellant has also requested a hearing. However, in the absence of an issue of material fact which would alter the outcome of this case, the request is denied pursuant to 43 CFR 4.415. Alumina Development Corp. of Utah, 77 IBLA 366 (1983).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified in part and vacated in part.

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C. Randall Grant, Jr.  
Administrative Judge

We concur:

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Wm. Philip Horton  
Chief Administrative Judge

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Franklin D. Arness  
Administrative Judge

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4/ These assessments are in the nature of liquidated damages, as noted above, and therefore, we will not consider whether appellant is entitled to a reduction to reflect "actual loss or damage" to the environment. There is no authority in the regulations to entertain a reduction. The regulation at 43 CFR 3163.3 provides that the specified liquidated damages "shall be deemed to cover loss or damage to the lessor," with one exception, i.e., "where actual losses or damages can be ascertained in an amount larger than [the liquidated damages]." (Emphasis added.) There is no authority to make an assessment of liquidated damages in an amount less than that specified in order to reflect a lesser "actual loss or damage."

